DOCUMENT RESUME

ED 042 451 JC 700 213

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TITLE	Statutes for Liberty.
INSTITUTION	Central Virginia Community Coll., Lynchburg.
REPORT NO	RR-2-70
PUB DATE	70
NOTE	18p.
EDRS PRICE	EDRS Price MF-$0.25 HC-$1.00
DESCRIPTORS	Bibliographies, *Communication Problems, *Counseling, *Counselors, *Junior Colleges, *Legal Problems, Legal Responsibility, State Legislation, State Standards, Student Personnel Services, Surveys
IDENTIFIERS	*Virginia

ABSTRACT

The prevalence of privileged communication statutes for counseling and the extent of knowledge concerning them are examined in this study. Information supplied by each of the 50 state attorneys general indicates that only four states--Indiana, Michigan, North Dakota, and Wisconsin--have laws specifically and directly authorizing privileged communication for counseling relationships or records in the educational field. A survey of both the Virginia community-junior college counselors and the membership of the Virginia Personnel and Guidance Association indicates no knowledge of such a law in their state. However, 96 per cent of the 55 counselors and 68 per cent of the 322 responding Association members support the passage of such laws. These two groups suggest that increased counselee confidence and greater counselor protection would result. The authors conclude with a statement of the minimum legal foundation they feel the counseling field in each state needs, a copy of the four statutes currently in existence, and an extensive bibliography on the subject. (JO)

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ED042451

CENTRAL VIRGINIA COMMUNITY COLLEGE

Lynchburg, Virginia

Office of Director of Institutional Research

STATUTES FOR LIBERTY

Research Report No. 2-70

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LOS ANGELES

OCT 09 1970

CLEARINGHOUSE FOR
JUNIOR COLLEGE
INFORMATION

JC 700 213

I. INTRODUCTION

A knowledge of the parameters of any given profession tends to be related to task effectiveness. Whereas it is often assumed that what one doesn't know won't hurt him, studies seem to indicate the obverse.

Professional counselors within the field of education need to know the legal implications of their daily practice, and the vast amount of material being published currently on related topics indicates their widely growing concern. In our increasingly crowded, electronic, and changing world, each counselor must have a practical understanding of such aspects if he would adequately and responsibly function, doing justice both to his counselees and to himself.

Nevertheless, as found in this study, while interest is progressively increasing many who are active in the field of counseling are quite unknowing, despite their own indications of concern! Are research writers largely alone in their attempts to grapple with these facts? Do counselors not care enough to know--to find out if only by reading? Perhaps counselor education programs have often failed suffiently to enlighten counselors regarding both the legal and ethical limits to confidentiality which is at the heart of counseling. No matter the reasons, few counselors surveyed in this study indicated awareness of the fact that there are prevailing limits. This report, therefore, is an attempt to break the ice, to assist counselors in becoming more aware and thus more accountable--cognizantly--for their work of mutual trust. Ignorance of the law is no excuse. Similar prevailing ethical aspects or limits were recently considered by Pardue, Whichard, and Johnson (1970).

II. STATEMENT OF THE PROBLEM

Knowledge of existing privileged communication laws or statutes appears to be desirable professionally. Can it reasonably be expected, therefore, that professionals would know of any privileged communication law or laws in the states in which they work? Can it be expected further that if there is no such law, that counselors would express willingness to endorse passage of one?

A final concern is whether counselors would consider as desirable derivatives of a privileged communication law such factors as those commonly associated with good counseling. The problem is, more specifically, would these three matters be answered in the expected manner by full-time counselors in the Virginia Community College System? If these fifty-five professionals could be considered as a sample of counselors in any state it might lead to a possible hypothesis concerning what might be expected on a broader scale.

In this context the question might be raised as to how these three matters are viewed by other counselors and various other interested educators throughout Virginia.

III. PROCEDURE

Legal state authorities were contacted in an effort to determine the extent of prevailing privileged communication statutes for counseling. In turn, two surveys of counselors and other interested educators in Virginia were conducted in order to ascertain the extent of prevailing knowledge pertaining to such current statutes.

A. Fifty State Attorneys General

Each of the 50 state Attorneys General were asked to list their state laws, preferably by number and year, which provide any privilege of CONFIDENTIAL COMMUNICATION for counseling relationships and/or records in the field of education.

Over the period of four months questionnaire returns were received from each of the 50--thus, the total responses came to 100%.

B. Virginia Community College Counselors

A three-question survey printed in the form of a post card was sent to all the fifty-five counselors in the Virginia Community College System. The questions were:

(1) Do you know of any privileged communication law in Virginia allowing for either an immunity for counselors or confidential communication in counseling? (North Dakota just passed this type of stature, whereas that of Wisconsin is up for repeal.)
(2) Would you endorse passage of such a law or statute in this state?
(3) How do you think such might enhance your professional effectiveness?

Two weeks were allowed for returns, then non-respondents were phoned. The initial response was 43 for 78%. After phoning, the total response came up to 100%.

The responses were tallied and categorized for summarization.

C. Virginia Counselors and Educators

A three-question survey printed in the form of a card was sent by a general mailing to the membership list of the Virginia Personnel and Guidance Association together with the official announcements regarding a one-day workshop entitled, "The Counselor

and the Law." The cards solicited responses which were to be used in a presentation at the workshop. The questions were:

(1) Do you know of any Virginia law prohibiting counselors from revealing, even when testifying in a court, information confidentially received?
(2) Would you prefer to counsel under such statutory provision?
(3) How might such enhance counseling effectiveness?

From the general mailing of several hundred cards there were 322 replies. The responses were tallied and catagorized for summarization and a synthesis was made for presentation.

IV. FINDINGS

A. Fifty state Attorneys general

On the basis of the fifty replies (100%) it is possible to report that at the beginning of 1970 only four states had any laws specifically and directly authorizing privileged communication for counseling relationships and/or records in the field of education--Michigan (1961 revised), Indiana (1965), Wisconsin (1968), and North Dakota (1969).

B. Virginia Community College Counselors

All fifty-five (100%) answered "No," that they did not know of any privileged communication law in Virginia allowing for either an immunity for counselors or confidential communication in counseling. No one made reference to the fact that such a statute had just been proposed. Fifty-three of the fifty-five (96.36%) said they would endorse passage of such a law or statute in the state of Virginia, while one of the fifty-five said he would not and another made no response.

Responses varied as to how such a law might enhance their professional effectiveness. (See Section "D" below.)

C. Virginia Counselors and Educators

All three hundred and twenty-two (322) replies answered question one negatively, no indication being made to the currently proposed bill. In answer to question two, 68.5% indicated their preference for obtaining such a law, 22.8% indicated their preference to the contrary. Just over 8% indicated no preference or no decision.

Responses varied as to how such a law might enhance their professional effectiveness. (See Section "D" below.)

D. How might a privileged communication law enhance counselors effectiveness?

In response to question number three, the respondents in both studies gave replies which could be grouped and tabulated only generally, since the question was open-ended. A few responses indicated that it was not clear to them how a privileged communication statute might help at all in making their counseling more effective. Of course, in keeping with a general positive answer to item two, most of the replies indicated that such would help; and these replies generally fell under three captions: (1) counselee confidence, (2) counselor protection, and (3) professional status. In the second study, of the 322 replies, 40 specifically indicated counselee confidence, 28 counselor protection, and 12 professional status. In the first study, all three categories were repeatedly included; but one simply stated that the provision "would help the counselor feel more professional."

While preparing the VPGA address, it became so obvious that most of the comments were virtually the same as the concepts

generally rendered by the search of the literature, the comments were simply tabulated and combined, and then edited and presented as the speech!

In the responses from the college counselors in the first study, no fully negative replies were found regarding question three, though a couple indicated considerable uncertainity about it. In the responses from the respondents in the second study, several negative replies were found, but none with noticeable substance. A few of the second study more or less stated that the matter "should be left to the counselor's discretion."

The majority of the respondents in both studies desired privileged communication for their counseling practice. By their own experiences they showed that there is a "growing importance of privileged communication in the counselor-counselee relationship" (Brugger, 1964, p. 58), though only four states have specific statutes granting the same. Apparently, many counselors do not know the existing provisions even in their own states.

V. CONCLUSIONS AND IMPLICATIONS

The questionnaire returns for each of the statute attorneys general show that at the beginning of 1970 only the four states of Michigan, Indiana, Wisconsin, and North Dakota had a specific privileged communication statute pertaining to counseling in education; and two surveys of counselors and other interested educators in Virginia regarding their knowledge and desires about any such statutes pertaining to their professional functioning indicates

a seeming general lack of knowledge and understanding.

> It is becoming less and less unusual for counselors to be confronted with a legal problem. It also seems safe to predict that in the future we will be hearing more and more about lawsuits and other legal matters wherein one of the parties is an educational institution or a person who has acted in the capacity of counselor....
>
> Obviously, there is a wide variety of <u>potential</u> problems in the legal area. It would seem that counselors might benefit from having more information about laws that affect them and more knowledge about legal problems (Schmidt, 1965, p. 378).

In the absence of such a legal provision, counselors should be careful to function in light of the policies set by the board of governors of their own school or institution, since such policies "have the force and effect of law in the absence of legislation to the contrary" (Huckins, 1968, p. 14). Should they have a part in formulating a confidentiality statute, they should take every precaution to see that they do not sacrifice clarity for brevity. Such a statute should be explicit (a too liberal wording can in effect deny the privilege intended), functionally defining the roles and or credentials of the professionals covered. The levels of education, the kinds of cases, the prohibitions or allowances of disclosure, and the possibilities of waiver are all important as well as features which are of peculiar importance to any particular state. These are minimal efforts which counselors can make, thereby upholding, respecting, and promoting the integrity and welfare of their counselees (Ware, 1964, pp. 159-160).

The readings and research of this study would uphold the following as a minimal statement of basics generally considered essential for the work of counseling in the field of education.

TESTIMONIAL PRIVILEGED COMMUNICATION AND COUNSELOR IMMUNITY IN EDUCATION. -- No one appointed to practice guidance and counseling in either a pre-collegiate school or an institution of higher learning by authority of its legally recognized board of governors will be required when giving testimony in any quasi-judicial or judicial proceeding in this state to disclose any communication or information which was both entrusted and received in confidence during the functioning of said authorized appointment, except by request or consent of the counselee himself or by his parent or legal guardian in the case of a minor.

Rather than wait for possibly embarrassing cases to arise to stimulate the consideration and passage of privileged communication laws, counselors should study the values of such statutory provisions and pursue the same in line with their own convictions. Then, in times of crisis, they will not be caught off guard, rather they will have definitive answers for their own individualized practices; and they will be less apt to be accused of negligence in the carrying out of their socially-endorsed tasks. With only the four statutes codified to date (see below), COUNSELORS MUST SEIZE THE OPPORTUNITY OF BUILDING FROM THE GROUND UP. The present opportunity for laying a legally authorized foundation for their highly important work of interpersonal relations must not be disregarded.

For convenient reference, the four current privileged communication statutes pertaining to counseling and education are provided on the following page.

MICHIGAN (1961 revision)
600.2165 SCHOOL TEACHERS AND EMPLOYEES; DISCLOSING STUDENTS' COMMUNICATIONS

No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has such records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records or such communications; nor to produce such records or transcript thereof, except that any such testimony may be given, with the consent of the person so confiding or to whom such records relate, if such person is 21 years of age or over, or, if such person is a minor, with the consent of his or her parent or legal guardian.

INDIANA (1965)
28-4339 IMMUNITY OF COUNSELORS FROM DISCLOSING PRIVILEGED OR CONFIDENTIAL COMMUNICATIONS

Any counselor duly appointed or designated a counselor for the school system by its proper officers and for the purpose of counseling pupils in such school system shall be immune from disclosing any privileged or confidential communication made to such counselor as such by any such pupil herein referred to. Such matters so communicated shall be privileged and protected against disclosure.

WISCONSIN (1968)
885.205 PRIVILEGED COMMUNICATIONS

No dean of men, dean of women or dean of students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except: (1) this prohibition may be waived by the student, (2) this prohibition does not include communications which such dean needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or of being made public, (3) this prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify.

NORTH DAKOTA (1969)
31-01-06.1 COUNSELORS SHALL BE IMMUNE FROM DISCLOSING INFORMATION GIVEN BY PUPILS

For the purpose of counseling in a school system, any elementary or secondary school counselor possessing a valid North Dakota guidance credential from the department of public instruction, and who has been duly appointed a counselor for a school system by its proper authority, shall be legally immune from disclosing any privileged or confidential communication made to such counselor in a counseling interview. Such communication shall be disclosed when requested by the counselee.

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